

PAGES 1 - 45

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MAGGIE CAMPBELL,)	
)	
PLAINTIFF,)	NO. C-13-2632 YGR
)	
VS.)	TUESDAY, APRIL 1, 2014
)	
EBAY, INC., ET AL.,)	OAKLAND, CALIFORNIA
)	
DEFENDANTS.)	MOTION TO DISMISS
_____)	

BEFORE THE HONORABLE YVONNE GONZALEZ ROGERS, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFF: ANTHONY A. FERRIGNO, ESQUIRE
1116 INGLESIDE AVENUE
ATHENS, TENNESSEE 37303

FOR DEFENDANT: SACKS RICKETTS & CASE, LLP
177 POST STREET, SUITE 600
SAN FRANCISCO, CALIFORNIA 94108
BY: LUANNE SACKS, ESQUIRE
MIKE SCOTT, ESQUIRE

SACKS RICKETTS & CASE
2800 NORTH CENTRAL AVE., STE. 1230
PHOENIX, ARIZONA 85004
BY: CINDY RICKETTS, ESQUIRE

REPORTED BY: DIANE E. SKILLMAN, CSR 4909, RPR, FCRR
OFFICIAL COURT REPORTER

TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION

1 TUESDAY, APRIL 1, 2014

2:00 P.M.

2 P R O C E E D I N G S

3 **THE CLERK:** CALLING CIVIL ACTION 13-2632 CAMPBELL
4 VERSUS EBAY.

5 COUNSEL, PLEASE COME FORWARD AND STATE YOUR APPEARANCES.

6 **MR. FERRIGNO:** GOOD AFTERNOON, YOUR HONOR. ANTHONY
7 FERRIGNO.

8 **THE COURT:** GOOD AFTERNOON.

9 **MR. FERRIGNO:** SORRY. GOOD AFTERNOON, YOUR HONOR.
10 ANTHONY FERRIGNO FOR THE PLAINTIFFS.

11 **MS. SACKS:** GOOD AFTERNOON, YOUR HONOR. LUANNE
12 SACKS, CINDY RICKETTS, AND I'M LOSING MY MIND TODAY -- MIKE
13 SCOTT ON BEHALF OF DEFENDANT EBAY AND PAYPAL.

14 **THE COURT:** AND WHO IS GOING TO BE ARGUING?

15 **MR. FERRIGNO:** I WILL BE, YOUR HONOR. I'M THE ONLY
16 ONE HERE FOR THE PLAINTIFFS.

17 **MS. SACKS:** AS LONG AS I CAN RECALL MY OWN NAME, I
18 WILL BE, YOUR HONOR.

19 **THE COURT:** OKAY, MS. SACKS.

20 WHO WROTE THE MOTION TO DISMISS?

21 **MS. SACKS:** YOUR HONOR, I DID ALONG WITH THE TWO
22 COLLEAGUES OF MINE WHO ARE HERE TODAY.

23 **THE COURT:** ALL RIGHT. WE'LL START FIRST WITH HOW DO
24 I PRONOUNCE YOUR NAME PROPERLY?

25 **MR. FERRIGNO:** FERRIGNO.

1 **THE COURT:** FERRIGNO?

2 **MR. FERRIGNO:** YES. IT'S LIKE THE N-Y IN CANYON.
3 FERRIGNO.

4 **THE COURT:** YOU ASKED FOR ORAL ARGUMENT?

5 **MR. FERRIGNO:** YES.

6 **THE COURT:** SIR, GO AHEAD.

7 **MS. SACKS:** YOUR HONOR, MAY I BE SEATED?

8 **THE COURT:** AT THIS POINT, YES. I DIDN'T NOTICE YOU
9 WERE ON CRUTCHES. OF COURSE.

10 **MR. FERRIGNO:** FIRST OF ALL, YOUR HONOR, I THINK
11 THERE ARE A NUMBER OF MISSTATEMENTS IN THE PAPERS OF THE
12 DEFENDANTS IN THEIR MOTION TO DISMISS -- IN THEIR REPLY BRIEF.

13 THEY SAY IN THEIR REPLY BRIEF THAT PLAINTIFFS ADMIT THAT
14 THEY ARE NOT SEEKING RESTITUTION REGARDING UCL CLAIMS AND THEY
15 CITE PAGES 13 AND 22 OF OUR OPPOSITION.

16 THIS IS NOT THE CASE. THE ONLY REFERENCE TO THE ISSUE OF
17 RESTITUTION AS POSSIBLY NOT RECOVERABLE IS AT PAGE 22 WHERE WE
18 STATE THAT IN THE EVENT THAT WE ARE NOT ABLE TO SEEK
19 RESTITUTION ON THE INTERNATIONAL SALES CLAIM UNDER THE UNFAIR
20 BUSINESS PRACTICES ACT, THAT WE WERE STILL SEEKING INJUNCTIVE
21 RELIEF. THAT'S THE ONLY INFERENCE IN OUR WHOLE BRIEF THAT WE
22 ARE NOT SEEKING RESTITUTION UNDER THE UCL. ALL THE OTHER FOUR
23 CLAIMS WE ARE.

24 **THE COURT:** COME ON BACK, MS. SACKS.

25 POINT ME TO THE PAGE THAT YOU'RE REFERENCING IN YOUR REPLY

1 BRIEF.

2 **MR. FERRIGNO:** AT PAGE 22 -- EXCUSE ME. AT -- I
3 DON'T KNOW IF I CITED THEIR PAGE NUMBER, BUT I HOPE I HAVE IT
4 HERE.

5 I WILL BE THERE IN A MOMENT, I THINK, YOUR HONOR. I HOPE.

6 (PAUSE IN THE PROCEEDINGS.)

7 I THINK IT MUST BE IN THE INTRODUCTION, YOUR HONOR. LET'S
8 SEE.

9 (PAUSE IN THE PROCEEDINGS.)

10 SORRY. YES, YOUR HONOR. AT PAGE 1 OF THEIR OPPOSITION --
11 OF THEIR REPLY BRIEF, WHICH I DON'T HAVE IN FRONT OF ME SO I
12 CAN'T GIVE YOU THE LINE NUMBERS, BUT THEY SAY THAT WE
13 ACKNOWLEDGE THAT NO RESTITUTION IS DUE BECAUSE SHE PAID NO
14 MONEY TO EITHER DEFENDANT.

15 AND THEN THEY CITE PAGES -- YOU'LL SEE A CITE IN PARENS 13
16 AND 22. AND AS I SAID, AT PAGE 22 --

17 **THE COURT:** YOU DON'T HAVE TO REPEAT.

18 **MR. FERRIGNO:** OKAY.

19 **THE COURT:** MS. SACKS, WHERE IS THE REFERENCE ON
20 PAGE 13 AND 22 TO SUPPORT YOUR STATEMENT?

21 **MS. SACKS:** YOUR HONOR, I'M LOOKING AT PAGE 22 FIRST,
22 IF I MAY. DEFENDANTS FURTHER ARGUE --

23 **THE COURT:** HOLD ON.

24 **MS. SACKS:** I'M SORRY.

25 **THE COURT:** WHAT LINE?

1 **MS. SACKS:** LINE 12, YOUR HONOR.

2 **THE COURT:** ALL RIGHT. GO AHEAD. WHAT IS YOUR
3 ARGUMENT.

4 **MS. SACKS:** I'M SORRY, YOU ARE DIRECTING THAT TO ME,
5 CORRECT, YOUR HONOR?

6 **THE COURT:** YES.

7 **MS. SACKS:** YOUR HONOR, THE ONLY RESTITUTION THAT
8 APPEARED CLEAR FROM THE ARGUMENTS IN THE THIRD AMENDED
9 COMPLAINT WAS THE ARGUMENT ABOUT INTERNATIONAL SALES.
10 PLAINTIFF HAS NEVER IDENTIFIED ANY SPECIFIC DOLLAR AMOUNTS IN
11 THE THIRD AMENDED COMPLAINT OR ANY OF THE PRIOR PLEADINGS
12 WHICH WERE MONIES THAT WERE PAID TO EBAY OR PAYPAL --

13 (SIMULTANEOUS COLLOQUY.)

14 **THE COURT:** AND THAT COULD BE.

15 WHAT I'M ASKING IS THAT YOU MADE A SPECIFIC STATEMENT.
16 AND, FRANKLY, THE REASON I STARTED THIS REASON ASKING WHO
17 WROTE THIS BRIEF IS BECAUSE I FOUND A NUMBER OF
18 INCONSISTENCIES BETWEEN WHAT YOU ARE ARGUING IN YOUR PAPERS
19 AND WHAT ACTUALLY EXISTS. AND WE ARE GOING TO GO THROUGH THIS
20 WITH A FINE TOOTH COMB, NOT NECESSARILY TODAY, BUT I'LL TELL
21 YOU, I DO NOT APPRECIATE LAWYERS MAKING ARGUMENTS THAT AREN'T
22 SUPPORTED. AND I WILL SANCTION IN THE FUTURE AND -- IF I SEE
23 IT.

24 **MS. SACKS:** I APPRECIATE THAT VERY MUCH, YOUR HONOR.

25 **THE COURT:** YOU SHOULD BECAUSE I'M NOT PLEASED WITH A

1 NUMBER OF THINGS THAT HAVE BEEN POINTED OUT TO ME WITH RESPECT
2 TO YOUR BRIEFING.

3 NOW, IT SAYS HERE, "SHE ACKNOWLEDGES THAT NO RESTITUTION
4 IS DUE". THAT'S WHAT YOU ARE TELLING ME IS THAT, JUDGE, I'VE
5 GOT AN ADMISSION IN THE PAPERS THAT SHE -- THERE'S NO
6 RESTITUTION DUE.

7 WHERE DOES SHE ADMIT THAT?

8 **MS. SACKS:** YOUR HONOR, I WOULD DISAGREE SLIGHTLY
9 WITH THAT AND THERE'S A SPECIFIC REASON WE USE THE WORD
10 "ACKNOWLEDGES" AS OPPOSED TO "ADMITS" OR "CONCEDES".

11 **THE COURT:** OKAY. WELL, THEN, WHAT I AM ASKING YOU
12 TO DO AS AN ADVOCATE IS NOT MISLEAD THE COURT.

13 **MS. SACKS:** I APOLOGIZE, YOUR HONOR. THAT WAS NOT
14 OUR INTENT IN ANY WAY.

15 **THE COURT:** ALL RIGHT. THEN WHAT WAS YOUR INTENT?
16 BECAUSE THAT'S WHAT'S SUGGESTED.

17 **MS. SACKS:** THE INTENT WAS TO POINT OUT THAT WE
18 RAISED THE ISSUE, AND PLAINTIFF ACKNOWLEDGED THAT WE RAISED
19 THIS ISSUE THAT SHE LACKED STANDING ON THIS. SHE HAS NOT
20 CLAIMED ANY MONIES DUE. AND WHEN WE RAISED IT AND SHE
21 ACKNOWLEDGED THAT WE RAISED IT, HER RESPONSE WAS NOT TO SAY,
22 OH, NO THEY'RE WRONG. WE HAVE RAISED THIS IN OUR TAC.
23 PLAINTIFF'S RESPONSE WAS TO SAY SIMPLY, WHETHER PLAINTIFF'S
24 RESTITUTION REMEDY FAILS OR NOT, SHE SEEKS INJUNCTIVE RELIEF.

25 IN NO WAY DID THEY PROVIDE ANY DIRECTION TO US OR TO THE

1 COURT AS TO HOW OUR READING OF THEIR TAC WAS INCORRECT WITH
2 REGARD TO THE RESTITUTION CLAIM.

3 **THE COURT:** MR. FERRIGNO.

4 **MR. FERRIGNO:** YES, YOUR HONOR. I THINK THAT
5 PARAGRAPH IS VERY STRONGLY LIMITED TO THE INTERNATIONAL SALES
6 CLAIM.

7 IN THE VERY FIRST SENTENCE, WHICH I THINK THE -- MS. SACKS
8 CITED PARTIALLY:

9 "DEFENDANTS FURTHER ARGUE THAT THE PLAINTIFFS LACK
10 STANDING TO SEEK RESTITUTION FROM DEFENDANT EBAY FOR
11 MONIES THAT PLAINTIFF LOST AS A RESULT OF THE
12 RESCISSION OF HER INTERNATIONAL SALES AGREEMENTS".

13 NOW -- AND THEN FURTHER ON, WE REFER TO OUR -- IF THE
14 RESTITUTION REMEDY FAILS OR NOT, THE PLAINTIFF AND THE MEMBERS
15 OF THE PLAINTIFF CLASS ARE SEEKING INJUNCTIVE RELIEF TO
16 PRECLUDE DEFENDANT EBAY FROM ORDERING PAYPAL TO REFUSE
17 PAYMENTS INTENDED FOR THE PLAINTIFF AND MEMBERS OF THE
18 PLAINTIFF CLASS FROM THEIR INTERNATIONAL BUYERS.

19 THIS -- THIS PARAGRAPH IS SOLELY LIMITED TO THE
20 INTERNATIONAL BUYER CLAIM WHERE EBAY IS ALLEGED TO
21 INTENTIONALLY INTERFERE WITH THOSE SALES AGREEMENTS BETWEEN
22 THE BUYERS AND SELLERS, AND DIRECT PAYPAL NOT TO GO THROUGH
23 WITH THE TRANSACTIONS AND REFUSE THE PAYMENTS.

24 SO I THINK IT'S VERY CLEAR THAT WE WERE LIMITED -- THAT --
25 THAT ISSUE WAS BEING LIMITED IN DISCUSSION AT THAT PAGE TO

1 THOSE TYPE OF SALES.

2 **THE COURT:** MR. FERRIGNO, YOUR NEXT ISSUE.

3 **MR. FERRIGNO:** OKAY. YOUR HONOR, THERE'S A STATEMENT
4 MADE THAT IS -- THAT WE HAVE FAILED --

5 **THE COURT:** AGAIN, I NEED A PAGE AND LINE NUMBER.

6 **MR. FERRIGNO:** OH, I AM SORRY, YOUR HONOR. I'M
7 AFRAID IN MY NOTES I DIDN'T REFER TO THE PAGE NUMBERS.

8 I THINK, AGAIN, I CAN FIND IT IF THE COURT WILL BEAR WITH
9 ME A LITTLE BIT.

10 (PAUSE IN THE PROCEEDINGS.)

11 THERE'S A REFERENCE TO YOUR ORDER, YOUR HONOR, AT ONE OF
12 THE PAGES IN THERE. I'M NOT SURE IF I'M GOING TO FIND THAT
13 ONE.

14 IF I CAN MAKE MY POINT, THOUGH. THEY REFER TO YOUR ORDER
15 SPECIFICALLY BY PAGE AND LINE NUMBER FROM YOUR DISMISSAL --
16 YOUR ORDER DISMISSING THE SECOND AMENDED COMPLAINT, I BELIEVE
17 IT WAS, AND -- EXCUSE ME, YOUR HONOR, THE FIRST AMENDED
18 COMPLAINT.

19 AND THEY STATE THAT WE HAVE FAILED IN THREE RESPECTS TO
20 NOT COMPLY WITH YOUR ORDERS. WE DID NOT STATE FACTS
21 SUFFICIENT TO SUPPORT EACH CLAIM. WE DID NOT ALLEGE THE LEGAL
22 GROUND ON WHICH THE CLAIM WAS BASED. AND WE DO NOT STATE
23 WHICH DEFENDANT THE CLAIM IS AGAINST.

24 WITH THE EXCEPTION OF A MISTAKE WE MADE IN INCLUDING
25 PAYPAL, I THINK IN THE INTENTIONAL INTERFERENCE CLAIM, IN ONE

1 OF THE CLAIMS, WE ENDEAVORED TO PUT AT THE TOP THE NAME OF THE
2 DEFENDANTS THAT WE WERE BRINGING THAT CAUSE OF ACTION AGAINST.

3 SO, FOR INSTANCE, THE SECOND CAUSE OF ACTION, BREACH OF
4 CONTRACT BY EBAY, INC., ET CETERA, WE TRIED DO THAT. I THINK
5 THERE WAS ONE TYPO OR ONE INADVERTENT ERROR THERE.

6 ALSO, I HAVE FACTS THAT I CAN CITE THROUGHOUT THIS
7 COMPLAINT, YOUR HONOR, THAT ARE DETAILED. YOU KNOW, I GUESS
8 THE QUESTION WOULD BE IN THIS CASE WHETHER THEY'RE
9 SUFFICIENTLY DETAILED, BUT WE CERTAINLY HAVE ALLEGED QUITE A
10 FEW FACTS TO SUPPORT OUR CLAIMS, AND I AM READY TO DISCUSS
11 THOSE, AS WELL AS THE LEGAL GROUND.

12 AND SO IF I GO ON TO THAT PART OF THE ARGUMENT.

13 **THE COURT:** WELL, I DON'T -- YOU INDICATED THAT YOU
14 WANTED TO HAVE ORAL ARGUMENT --

15 **MR. FERRIGNO:** YES, YOUR HONOR.

16 **THE COURT:** -- BECAUSE OF MISREPRESENTATIONS MADE
17 DURING THE REPLY. ALL RIGHT. SO --

18 **MR. FERRIGNO:** NO. I'M SORRY, YOUR HONOR, WITH
19 RESPECT, I JUST -- I THINK I SAID IN THE LETTER TO THE COURT
20 THAT I WOULD LIKE AN OPPORTUNITY TO RESPOND TO CERTAIN
21 STATEMENTS MADE.

22 **THE COURT:** ALL RIGHT.

23 **MR. FERRIGNO:** I DIDN'T SAY THAT THEY -- IN THAT
24 LETTER THAT THEY HAD MISREPRESENTED --

25 **THE COURT:** WHAT'S THE NEXT ISSUE?

1 **MR. FERRIGNO:** THE NEXT ISSUE, YOUR HONOR, IS WE HAVE
2 MISS -- WE HAVE MISCITED PLEADING STANDARDS. I DON'T THINK WE
3 HAVE DONE THAT. I THINK WE CITED TWO CASES SINCE TWOMBLY, AND
4 I THINK THAT THE ISSUE ON THE PLEADINGS IS -- HAS TO DO WITH
5 THE DEGREE OF FACTUAL ALLEGATIONS THAT ARE REQUIRED IN SOME
6 KIND OF CONTINUUM.

7 I THINK THE COURT WAS CORRECT THAT THERE NEEDS TO BE A
8 CERTAIN NUMBER OF FACTS ALLEGED. I THINK WE'VE COMPLIED WITH
9 THE STANDARD HERE. AND SIMPLY ALL WE DID WAS POINT OUT WHAT
10 THE PLEADING STANDARDS WERE BY DISCUSSING THE CASES. AND I
11 DON'T THINK WE MISCITED ANYTHING.

12 THE OTHER THING IS, YOUR HONOR, I THINK IT IS VERY
13 CLEAR --

14 **THE COURT:** MS. SACKS --

15 **MR. FERRIGNO:** -- THAT WE DID NOT ADMIT -- YES, THANK
16 YOU.

17 **THE COURT:** -- DO YOU WANT TO BRING A CHAIR UP SO YOU
18 CAN SIT DOWN WHILE YOU ARE NOT ADDRESSING ME? YOU'RE WELCOME
19 TO PULL A CHAIR UP.

20 **MS. SACKS:** THANK YOU.

21 **THE COURT:** GO AHEAD.

22 **MR. FERRIGNO:** THE NEXT POINT, IF YOU WANT ME TO MOVE
23 ON, YOUR HONOR, OR UNLESS YOU WANT --

24 **THE COURT:** I DO. I KNOW THE STANDARDS OF A MOTION
25 TO DISMISS. I DON'T NEED TO BE BRIEFED, ACTUALLY, BY LAWYERS,

1 BUT GO AHEAD.

2 **MR. FERRIGNO:** RIGHT.

3 AND THEN THE NEXT POINT I WANTED TO MAKE, AN ARTICLE III
4 STANDING, THE DEFENDANTS' CLAIM THAT EVERYTHING WAS
5 SELF-INFLICTED BY CONSENT TO THE CONDUCT COMPLAINED OF. AND I
6 THINK BY VIRTUE OF JUST ANALYZING THE ALLEGATIONS IN THE
7 COMPLAINT THAT IT CAN BE EASILY SEEN THAT THAT JUST ISN'T
8 TRUE.

9 FOR INSTANCE, IN THE ISSUE WITH REGARD TO THE POLICY WE
10 ALLEGE THAT IN PRACTICE, EBAY APPLIES THE BUYER'S-ALWAYS-RIGHT
11 PRACTICE. IF THAT IS THE CASE, THEN THE PROVISION THAT WE
12 CITED IN OUR COMPLAINT HAVING TO DO WITH THE -- THAT GIVING
13 THEM THE SOLE DISCRETION, YOUR HONOR, TO RESOLVE DISPUTES
14 BETWEEN THE BUYER AND THE SELLER, IF THAT WERE -- IF THAT IS
15 THE CASE, THERE'S NO DISCRETION BEING EXERCISED AT ALL. I
16 THINK WE MADE THAT POINT. THAT IS A BREACH OF THE AGREEMENT
17 TO EXERCISE DISCRETION --

18 **THE COURT:** LET ME ASK YOU --

19 **MR. FERRIGNO:** -- THEY'RE NOT EXERCISING DISCRETION
20 IF THEY'RE ALWAYS RIGHT.

21 **THE COURT:** I DON'T UNDERSTAND HOW THIS -- I DON'T
22 UNDERSTAND HOW YOU ENVISION IN ANY WAY, SHAPE, OR FORM A CLASS
23 ACTION ON THIS PARTICULAR TOPIC UNLESS YOU ARE SAYING THAT
24 THEY NEVER, NEVER FIND FOR THE SELLER.

25 **MR. FERRIGNO:** WELL --

1 **THE COURT:** OTHERWISE, I WOULD HAVE TO LOOK AT EVERY
2 SINGLE TRANSACTION, WHICH IS CERTAINLY NOT -- DOES NOT COMPLY
3 WITH THE RULES RELATED TO THE USE OF THAT PARTICULAR
4 PROCEDURAL TOOL FOR RESOLVING DISPUTES.

5 I JUST -- I'M STRUGGLING WITH UNDERSTANDING HOW, EVEN IF
6 YOU HAD INDIVIDUAL CLAIMS, HOW THIS COULD EVER PROCEED AS A
7 CLASS ACTION.

8 **MR. FERRIGNO:** WELL, YOUR HONOR, ALL I CAN SPEAK TO
9 IS OUR -- WE HAVEN'T DONE ANY DISCOVERY, OBVIOUSLY, AND ALL I
10 CAN POINT TO IS IN OUR PLAINTIFF'S EXPERIENCE, THEY HAVE NEVER
11 BEEN -- THERE HAS NEVER BEEN A FINDING IN FAVOR OF OUR
12 PLAINTIFF. WE CITE, I THINK, 133 INSTANCES. WE CITE 13 WITH
13 SPECIFICS.

14 I MEAN, WE CAN DO PROBABLY THE 133, BUT THEN WE WOULD
15 HAVE, YOU KNOW, A SUMMARY JUDGMENT MOTION IN OUR PLAINTIFF'S
16 PAPERS OR SOMETHING. IT WOULD BE 300-PAGE COMPLAINT.

17 BUT OUR CLIENT'S EXPERIENCE IS THAT THE BUYER IS ALWAYS
18 RIGHT WITH EBAY, AND I'M SURE OUR BUYER, IF -- IF HER
19 DEPOSITION WERE TAKEN, WOULD -- WOULD SAY THAT IN TALKING WITH
20 OTHER EBAY SELLERS, THAT THEY HAVE HAD THE SAME EXPERIENCE.

21 WELL, WE WON'T KNOW FULLY UNTIL THERE IS THE ABILITY TO DO
22 THE DISCOVERY CERTAINLY, BUT LET'S SAY THAT WE HAD. ONE
23 EXCEPTION OR A FEW EXCEPTIONS IN MILLIONS OF TRANSACTIONS,
24 I -- I -- I DON'T KNOW THAT THAT WOULD BE AN IMPEDIMENT TO
25 CERTIFYING THE CLASS.

1 **THE COURT:** THAT'S WHY I ASKED.

2 **MR. FERRIGNO:** YES.

3 **THE COURT:** I ASKED WHETHER YOUR ALLEGATION IS THAT
4 NEVER, THAT IT NEVER HAPPENS.

5 **MR. FERRIGNO:** WHAT OUR ALLEGATION IS, IS THAT THEY
6 HAVE A POLICY THAT THEY FOLLOW THAT THE BUYER ALWAYS WINS.
7 DOES THAT MEAN THAT IN PRACTICE EVERY SINGLE TIME THEY HAVE
8 FAVORED THE BUYER?

9 **THE COURT:** AN UNWRITTEN POLICY?

10 **MR. FERRIGNO:** I DON'T KNOW.

11 I DOUBT IT WOULD BE IN WRITING, YOUR HONOR, BECAUSE THEY
12 SAY THAT THEY WILL EXERCISE IN THEIR SOLE DISCRETION --

13 **THE COURT:** SO YOU ARE SAYING --

14 **MR. FERRIGNO:** -- THE RESOLUTION OF THESE DISPUTES.

15 **THE COURT:** YOU'RE SAYING THAT THERE IS AN UNWRITTEN
16 POLICY?

17 **MR. FERRIGNO:** YES, YOUR HONOR, IN PRACTICE.

18 AND OBVIOUSLY THE COMMON PRACTICES OF A PARTY ARE AT ISSUE
19 IN A CLASS ACTION.

20 **THE COURT:** ALL RIGHT. NEXT ISSUE?

21 **MS. SACKS:** YOUR HONOR, MAY I RESPOND AS WE GO
22 THROUGH THE ISSUES OR DO YOU WANT ME TO WAIT UNTIL THEY ARE
23 ALL RAISED?

24 **THE COURT:** SO FAR I HAVEN'T NEEDED ANY RESPONSE.

25 **MS. SACKS:** FINE. THANK YOU.

1 **MR. FERRIGNO:** YOUR HONOR, THE OTHER -- THE OTHER
2 STATEMENT THAT I FIND NOT TOTALLY -- OR SOMEWHAT DISINGENUOUS
3 IS THAT WE CANNOT RELY ON THE EBAY AND PAYPAL CONTRACTS THAT
4 WE'VE ATTACHED TO THE COMPLAINT BECAUSE WE DON'T ISOLATE A
5 GIVEN PROVISION IN ALL INSTANCES. IN FACT, I THINK WE ONLY
6 DID IT ONCE IN OUR COMPLAINT. IT MAY HAVE BEEN MORE THAN
7 ONCE. BUT IT'S IN THOSE CONTRACTS. AND THE CONTRACTS WERE
8 INCORPORATED IN THE -- IN THE PLEADING. AND SO I THINK THAT
9 IF WE HAVE A HEARING LIKE THIS AND WE POINT OUT WHERE IN THE
10 CONTRACTS THE PROVISIONS ARE THAT SUPPORT OUR POSITION, THAT
11 THAT IS SUFFICIENT. SO I WANTED TO MAKE THAT POINT.

12 AND ALWAYS, I THINK, THE COURT HAS THE POWER AND
13 DISCRETION TO ALLOW US TO AMEND. AND SO HAVING ATTACHED ALL
14 OF THE DOCUMENTS WE DID TO THE REQUEST FOR JUDICIAL NOTICE, WE
15 THINK THAT THE COURT, AND I THINK THERE IS AN INFERENTIAL
16 ADMISSION ON THEIR PART THAT YOU CAN'T USE THOSE. AND,
17 THEREFORE, YOU KNOW, YOU HAVE TO DISMISS THE THIRD AMENDED --
18 THE THIRD AMENDED COMPLAINT.

19 BUT THE INFERENCE THERE IS THAT IF WE COULD USE THOSE,
20 THEY MIGHT SUPPORT ADDITIONALLY THE CLAIMS WE ARE MAKING. I
21 THINK THE THIRD AMENDED COMPLAINT, AS IT STANDS, SHOULD --
22 SHOULD SURVIVE THIS MOTION TO DISMISS. BUT, WE WOULD REQUEST
23 AN OPPORTUNITY TO AMEND IF THE COURT DISAGREES.

24 AND THAT'S ALL I HAD ON THE ISSUES WITH REGARD TO WHAT
25 THEY'RE SAYING IS -- IS -- AND I THINK IS NOT TOTALLY

1 ACCURATE.

2 NOW, I DO HAVE SOME THINGS I WANTED TO POINT OUT TO THE
3 COURT HAVING TO DO WITH THEIR REFERENCE TO 10.1B IN THE
4 EBAY -- EXCUSE ME, IN THE PAYPAL CONTRACT. AND THAT IS
5 EXHIBIT B -- EXCUSE ME, EXHIBIT A, YOUR HONOR, TO THE
6 COMPLAINT.

7 THEY CITE, AND THIS GOES TO -- I WILL GIVE YOU THE -- PAGE
8 NUMBER HERE IN A MOMENT. IT IS ALWAYS DOWN. 10.1, YOUR HONOR,
9 AND 10.1B IS AT PAGE 16 OF 33 IN OUR THIRD AMENDED COMPLAINT.

10 AND -- ARE YOU THERE, YOUR HONOR?

11 **THE COURT:** YOU'RE LOOKING AT WHICH DOCKET?

12 **MR. FERRIGNO:** I'M LOOKING AT DOCUMENT 43, YOUR
13 HONOR.

14 **THE COURT:** OKAY.

15 **MR. FERRIGNO:** AT 16 OF 33. AND IT'S UNDER PARAGRAPH
16 OR PROVISION, I GUESS, IT WOULD BE PROVISION 10.

17 **THE COURT:** I'M THERE NOW. GO AHEAD.

18 **MR. FERRIGNO:** YES.

19 THEY CITE IN THEIR PAPERS THAT THIS IS A SELF-INFLICTED
20 ISSUE BECAUSE THEY MAKE THE ARGUMENT THAT THE SELLER AGREES TO
21 NOT RECEIVING THE ITEM BACK EVEN IF EBAY REFUNDS THE MONEY,
22 AND THEY CITE THIS LANGUAGE: YOU MAY NOT RECEIVE THE ITEM
23 BACK -- "IN SOME CASES YOU MAY NOT RECEIVE THE ITEM BACK".

24 AS YOU WILL NOTE, YOUR HONOR, THOSE -- THAT LANGUAGE IS IN
25 PARENTHESES. IT IS A PARENTHETICAL COMMENT REALLY CONNOTING

1 THAT THAT'S PROBABLY AN EXCEPTION.

2 AND IF YOU LOOK AT THE OTHER PROVISIONS THAT I WOULD LIKE
3 TO CITE YOU TO TO THIS AGREEMENT, AND I'M GOING TO PARAPHRASE
4 THE QUOTATIONS, YOU WILL SEE THAT THE PAYPAL AGREEMENT IS
5 REplete WITH REFERENCES THAT SHOW THAT THERE WAS AN INTENTION
6 IN THIS AGREEMENT TO ALLOW THE RETURN OF THE -- TO PROVIDE FOR
7 THE RETURN OF THE PRODUCTS.

8 SO, FOR INSTANCE, IF YOU READ FURTHER IN 10.1B, IT STATES:

9 "IF A BUYER FILES A SIGNIFICANTLY NOT-AS-DESCRIBED
10 CLAIM FOR AN ITEM THEY PURCHASE FROM YOU, YOU WILL
11 GENERALLY BE REQUIRED TO ACCEPT THE ITEM BACK AND
12 REFUND THE BUYER THE FULL PURCHASE PRICE PLUS
13 ORIGINAL SHIPPING COSTS."

14 OBVIOUSLY THERE, "YOU WILL BE REQUIRED TO ACCEPT THE ITEM
15 BACK" CONTEMPLATES A RETURN OF THE ITEM.

16 AT 13.4 OF THE PAYPAL AGREEMENT:

17 "IF YOU ARE ELIGIBLE FOR PAYPAL PURCHASE PROTECTION,
18 AND PAYPAL FINDS IN YOUR FAVOR ON YOUR CLAIM, PAYPAL
19 WILL REIMBURSE YOU FOR THE FULL PURCHASE PRICE OF THE
20 ITEM AND THE ORIGINAL SHIPPING COST WITH NO CAP ON
21 COVERAGE. PAYPAL WILL NOT REIMBURSE YOU FOR THE
22 RETURN SHIPPING COSTS THAT YOU INCUR TO RETURN A
23 SIGNIFICANTLY NOT-AS-DESCRIBED ITEM TO THE SELLER OR
24 OTHER PARTY SPECIFIED BY PAYPAL."

25 OBVIOUSLY, AGAIN, IT CONTEMPLATES RETURN.

1 13.5 PROVIDES:

2 "COMPLY WITH PAYPAL SHIPPING REQUEST IN A TIMELY
3 MANNER. FOR SIGNIFICANTLY NOT-AS-DESCRIBED SNAD
4 CLAIMS, PAYPAL MAY REQUIRE YOU AT YOUR EXPENSE TO
5 SHIP THE ITEM BACK TO THE SELLER OR TO PAYPAL OR TO A
6 THIRD PARTY AND TO PROVIDE PROOF OF DELIVERY."

7 AND 13.5 FURTHER PROVIDES:

8 "IN THE EVENT THAT PAYPAL MAKES A DECISION IN FAVOR
9 OF THE BUYER OR SELLER, EACH PARTY MUST COMPLY WITH
10 PAYPAL'S DECISION. PAYPAL WILL GENERALLY REQUIRE THE
11 BUYER TO SHIP AN ITEM THAT THE BUYER CLAIMS IS SNAD,
12 WHICH IS SIGNIFICANTLY NOT AS DESCRIBED, BACK TO THE
13 SELLER AT THE BUYER'S EXPENSE. AND PAYPAL WILL
14 GENERALLY REQUIRE THE SELLER TO ACCEPT THE ITEM BACK
15 AND REFUND THE BUYER THE FULL PURCHASE PRICE PLUS
16 ORIGINAL SHIPPING COSTS."

17 I NOTE THERE, YOUR HONOR, THAT THAT INFERS VERY STRONGLY
18 THAT YOU GET THE ITEM BACK AND SELLER THEN MUST REFUND THE
19 MONEY IN THAT ORDER AS WELL, WHICH IS A POINT THAT WE ARE
20 CRITICIZED FOR IN THE OPPOSITION BRIEF AS WELL.

21 SO -- SO THAT'S ON THOSE PROVISIONS WITH RESPECT TO
22 PAYPAL.

23 I ALSO WOULD LIKE, YOUR HONOR, TO -- I WOULD LIKE TO
24 RESPECTFULLY REFER THE COURT TO EXHIBIT B WHICH IS THE EBAY
25 AGREEMENT. AND NOW I'M SWITCHING TOPICS FOR A MOMENT TO

1 INTERNATIONAL SALES.

2 AND YOU WILL SEE THAT THERE WAS NOT JUST THE LANGUAGE IN
3 THE COMPLAINT THAT SAYS YOU CAN BUY AND SELL -- EXCUSE ME, YOU
4 CAN SELL ANYWHERE AT ANY PLACE, ANY TIME, AND SO FORTH, WHICH
5 IS WELL AND GOOD ON ITS OWN, BUT IN ADDITION TO THAT, IN THE
6 INTRODUCTION TO THE EBAY COMPLAINT, YOU HAVE ALL KINDS OF
7 LANGUAGE THAT ALLOWS FOR THE INTERNATIONAL SALES. AND I WILL
8 JUST QUOTE THE ONE PORTION.

9 "WELCOME TO EBAY. BY USING EBAY, INCLUDING EBAY.COM
10 AND ITS RELATED SITES, SERVICES, AND TOOLS, YOU AGREE
11 TO THE FOLLOWING TERMS WITH EBAY, INC. AND THE
12 GENERAL PRINCIPLES FOR THE WEBSITES OF OUR
13 SUBSIDIARIES AND INTERNATIONAL AFFILIATES. IF YOU
14 RESIDE OUTSIDE OF THE UNITED STATES, YOU ARE
15 CONTRACTING WITH ONE OF OUR INTERNATIONAL EBAY
16 COMPANIES. IN COUNTRIES WITHIN THE EUROPEAN UNION,
17 YOUR CONTRACT IS WITH EBAY EUROPE SARL", IS BEST I
18 CAN READ THAT, YOUR HONOR -- "IN ALL OTHER COUNTRIES,
19 YOUR CONTRACT IS WITH EBAY INTERNATIONAL AG. IF YOU
20 HAVE ANY QUESTIONS, PLEASE REFER TO OUR HELP
21 SECTION."

22 SO I THINK THAT IT'S DEFINITELY SHOWN BY THE VERY LANGUAGE
23 IN THE EBAY AGREEMENT THAT INTERNATIONAL SALES ARE
24 CONTEMPLATED AND AUTHORIZED FOR SELLERS AND BUYERS IN THE EBAY
25 AGREEMENT. AND THEY SPECIFY WHO THE ENTITIES ARE THAT ARE

1 RELATED TO EBAY IN THE UNITED STATES THAT THEY ARE ALSO
2 CONTRACTING WITH.

3 **THE COURT:** I DON'T UNDERSTAND YOUR ARGUMENT. ALL
4 THAT SAYS IS THAT THERE ARE INTERNATIONAL AFFILIATES THAT DEAL
5 WITH EBAY CUSTOMERS IN DIFFERENT COUNTRIES.

6 WHERE DOES IT TALK ABOUT -- OR IS THERE ANY OTHER PLACE TO
7 SUPPORT YOUR ARGUMENT?

8 **MR. FERRIGNO:** WELL, YOUR HONOR, THE ONLY REFERENCE I
9 THINK TO INTERNATIONAL OTHER THAN ALL OF THE REFERENCES,
10 THERE'S HUGE REFERENCES IN PAYPAL ABOUT MONEY EXCHANGE AND ALL
11 OF THAT, BUT RIGHT NOW I'M LOOKING AT THE EBAY BECAUSE WE'RE
12 SAYING THAT THEY INTENTIONALLY INTERFERED.

13 BUT THE ONE SENTENCE I READ FROM THIS, "IF YOU RESIDE
14 OUTSIDE OF THE UNITED STATES, YOU ARE CONTRACTING WITH ONE OF
15 OUR INTERNATIONAL EBAY COMPANIES" --

16 **THE COURT:** AND THAT'S -- SHE DOESN'T.

17 **MR. FERRIGNO:** PARDON ME? SHE DOESN'T, BUT THE BUYER
18 DID, YOUR HONOR. AND SHE'S MAKING -- THE BUYER'S CONTRACTING
19 WITH SOMEONE IN THE UNITED STATES. AND THE PAYPAL PROVISIONS
20 ARE SET UP FOR INTERNATIONAL SALES. THIS WOULD HAVE NO
21 PURPOSE IN HERE, REALLY, IF -- IF IT WASN'T GOING TO BE --

22 **THE COURT:** WELL, EXCEPT IF YOU HAD -- THE WAY I READ
23 THIS, AND -- AND I WILL SPEND MORE TIME WITH IT. THE WAY I
24 READ THIS, I UNDERSTOOD THAT THERE WERE OTHER -- THERE WERE
25 INTERNATIONAL OPERATIONS. AND FOR THE INTERNATIONAL

1 OPERATIONS, THERE WAS A SEPARATE ENTITY THAT DEALT
2 INTERNATIONALLY. I DIDN'T NECESSARILY READ THIS TO ENDORSE
3 INTERNATIONAL ACTIVITIES BETWEEN THE UNITED STATES AND
4 EUROPEAN COUNTRIES.

5 BUT, LIKE I SAID, THAT'S WHY I ASKED IF YOU HAD ANYTHING
6 ELSE.

7 **MR. FERRIGNO:** WELL, I GUESS I'M HAVING A PROBLEM
8 RESOLVING THIS LANGUAGE I JUST READ. I'M NOT GOING TO READ IT
9 AGAIN; THAT IF YOU'RE OUTSIDE OF THE UNITED STATES YOU ARE
10 CONTRACTING WITH ONE OF OUR INTERNATIONAL. THEY ARE DIRECTING
11 THAT TO WHOEVER IS SIGNING THIS THING.

12 **THE COURT:** IF YOU ARE IN ENGLAND -- I GUESS WHAT I
13 READ, IF YOU'RE IN ENGLAND AND YOU WANT TO USE EBAY TO
14 CONTRACT WITH SOMEONE ELSE IN ENGLAND, WOULDN'T YOU BE USING
15 THAT OTHER ORGANIZATION? NOT EBAY, BUT THEIR INTERNATIONAL
16 SUBSIDIARY OR AFFILIATE.

17 **MR. FERRIGNO:** YOU KNOW, YOUR HONOR, I JUST -- BY
18 SIGNING THIS THING, AND THEN IT SAYS YOUR CONTRACT IS WITH
19 EBAY EUROPE, I JUST THINK THEY'RE SAYING YOU SIGN THIS, YOU'RE
20 AUTOMATICALLY SUBJECT TO OUR EBAY EUROPE CONTRACT.

21 BUT MAYBE, YOU KNOW, THAT'S UP TO DISPUTE. BUT AT LEAST
22 IT IS ARGUABLE, AND OBVIOUSLY THEY PERMITTED INTERNATIONAL
23 SALES FOR I DON'T KNOW HOW MANY YEARS WE ALLEGE IN THE
24 COMPLAINT, I FORGET, BUT MANY YEARS WITH OUR PLAINTIFF.
25 AND --

1 **THE COURT:** RIGHT.

2 **MR. FERRIGNO:** -- THEN THIS CONDUCT COMMENCED.

3 THE OTHER POINT I WANTED TO MAKE THAT I THINK IS IMPORTANT
4 WITH RESPECT TO THE REPLY BRIEF IS THE ISSUE ABOUT
5 UNCONSCIONABILITY AS WELL AS A BALANCING TEST.

6 BUT, FIRST, I WOULD LIKE TO ADDRESS THE UNCONSCIONABILITY
7 PROVISION.

8 **THE COURT:** LET ME HEAR FROM MS. SACKS.

9 **MR. FERRIGNO:** OKAY. YES, YOUR HONOR.

10 **MS. SACKS:** YOUR HONOR, IN AN ATTEMPT TO RESPOND TO
11 THE ISSUES RAISED BY MR. FERRIGNO, LET ME STEP BACK, PLEASE,
12 TO THE CLASS ISSUE THAT YOU DID RAISE.

13 THIS HAS BEEN GOING ON NOW FOR ALMOST 18 MONTHS. AND THE
14 PROBLEM THAT YOU'VE IDENTIFIED IS THAT THE ONLY PERSON WHO ANY
15 INFORMATION IS PROVIDED ABOUT WHATSOEVER TO THE COURT IS THIS
16 ONE NAMED PLAINTIFF, MS. CAMPBELL. AND YET WE ARE ALL BEING
17 ASKED TO EXTRAPOLATE FROM HER ACROSS ALL EBAY AND PAYPAL
18 CUSTOMERS.

19 **THE COURT:** IT IS NOT UNCOMMON.

20 **MS. SACKS:** ACTUALLY, YOUR HONOR, WHEN YOU'RE TRYING
21 TO SAY THAT, IN FACT, IT IS ALWAYS DONE EXACTLY THE SAME AND
22 YOU HAVE NO WRITTEN POLICY, YOU HAVE NOTHING BEYOND THE
23 SUPPOSITION AND SPECULATION THAT HAS BEEN PRESENTED TO THIS
24 COURT, THAT EVERYBODY ELSE HAS TO BE THE SAME. AND COUNSEL
25 CERTAINLY HAD --

1 **THE COURT:** I'M GOING TO CUT YOU OFF BECAUSE THAT IS
2 SOMETHING THAT I RAISED. I DIDN'T SEE -- AM I -- I DON'T
3 THINK YOU BROUGHT A MOTION ON STRIKING CLASS ALLEGATIONS.

4 **MS. SACKS:** ABSOLUTELY, YOUR HONOR. ABSOLUTELY, YOUR
5 HONOR. WHAT I'M TRYING TO SAY IS THAT FOR EXACTLY --

6 **THE COURT:** CORRECT?

7 **MS. SACKS:** THAT'S CORRECT, WE HAVE NOT BROUGHT A
8 MOTION TO STRIKE.

9 BUT AS YOU RAISED, ONE OF THE DIFFICULTIES IN TAKING THE
10 VERY, VERY SLIM FACTS THAT HAVE BEEN PLED THAT RELATE ONLY TO
11 MS. CAMPBELL, AND TRYING TO MAKE THOSE THE BASIS OF A
12 COMPLAINT THAT INVOLVES ALL EBAY PURCHASERS, THIS IS WHY WE'RE
13 ALL STRUGGLING WITH THIS.

14 THE IDEA THAT THE BUYER IS ALWAYS RIGHT THAT KEEPS
15 APPEARING IN QUOTATION MARKS THROUGHOUT THE THIRD AMENDED
16 COMPLAINT AND PLAINTIFF'S OPPOSITION, THAT IS NOT A STATED
17 POLICY OF EBAY THAT APPEARS ANYPLACE.

18 **THE COURT:** OKAY. BUT WE ARE ON A MOTION TO DISMISS.
19 SO I AM, BY LAW, REQUIRED TO ACCEPT THE TRUTH OF THE
20 ALLEGATIONS THAT ARE IN FRONT OF ME.

21 **MS. SACKS:** YES. AND AS YOUR HONOR SAID IN THE
22 ORDER, YOU ARE REQUIRED TO TAKE THE FACTS AS LONG AS THEY ARE
23 NOT SIMPLY CONCLUSIONS OF FACT.

24 **THE COURT:** HE'S GOT 113 REFERENCES, 13 SPECIFIC OR
25 WHATEVER THOSE NUMBERS WERE. THAT'S NOT CONCLUSORY.

1 **MS. SACKS:** WELL, HE STATES SOME INFORMATION ABOUT
2 THEM, BUT, FOR INSTANCE, TO MAKE THIS MORE PRECISE, COUNSEL
3 WAS JUST TALKING ABOUT SNAD. SO SIGNIFICANTLY NOT IN
4 COMPLIANCE -- WHATEVER THE WORDS ARE -- TRANSACTIONS. HE
5 HASN'T ALLEGED A SINGLE ONE OF THOSE SALES INVOLVED AN SNAD
6 SITUATION. SO WHY ARE WE TALKING ABOUT THE PROVISIONS OF THE
7 USER AGREEMENT THAT TALK ABOUT SNAD TRANSACTIONS?

8 **THE COURT:** ALL RIGHT. RESPONSE TO THAT.

9 **MR. FERRIGNO:** YES, YOUR HONOR.

10 WE ARE TALKING ABOUT FRAUDULENT BUYERS, AND THAT'S WHAT WE
11 ALLEGE. NOT EVERY ONE OF THESE IS AN SNAD. YOU CAN HAVE A
12 FRAUDULENT BUYER WHO CLAIMS, FOR INSTANCE, THAT THEY NEVER
13 RECEIVED THE PRODUCT, AS AN EXAMPLE, AND DISPUTE ENTITLEMENT
14 TO THE MONEY BEING PAID OVER TO THE SELLER BECAUSE THEIR POINT
15 IS, WELL, WE NEVER RECEIVED IT. SO THAT'S JUST ONE EXAMPLE.

16 THESE ARE FRAUDULENT BUYERS. IT'S NOT LIMITED TO THE SNAD
17 PROVISION.

18 **THE COURT:** ARE THERE ANY EXAMPLES OF THE SNAD, IF
19 THAT'S THE ACRONYM? ARE THERE ANY IN THE COMPLAINT?

20 **MR. FERRIGNO:** DID WE SPECIFICALLY STATE IT WAS SNAD
21 OR NOT? NO. WE JUST SAID FRAUDULENT BUYERS, I BELIEVE, YOUR
22 HONOR.

23 **THE COURT:** ALL RIGHT.

24 MS. SACKS, KEEP GOING.

25 **MR. FERRIGNO:** WE DID --

1 **MS. SACKS:** ANOTHER -- I'M SORRY. I DIDN'T MEAN TO
2 INTERRUPT, COUNSEL.

3 **MR. FERRIGNO:** WE DID GIVE THE DATE THAT THE
4 RESOLUTION WAS MADE IN FAVOR OF THE BUYER BY EBAY. WE DID
5 GIVE THE AMOUNT OF MONEY THAT WAS INVOLVED IN EACH OF THE
6 TRANSACTIONS, I THINK, EXCEPT MAYBE FOR ONE. AND WE DID GIVE
7 THE NUMBER OF TRANSACTIONS THAT WERE INVOLVED IN THE
8 RESOLUTION IN FAVOR OF THE BUYER. AND IN ONE CASE I THINK WE
9 GAVE THE NAME.

10 BUT THAT'S WHAT WE DID. WE GAVE THE DATES. WE GAVE THE
11 OTHER INFORMATION I JUST RECITED. IF WE HAVE TO GIVE MORE, I
12 BELIEVE WE CAN, BUT I THINK THAT THIS IS SUFFICIENT TO PUT
13 THEM ON NOTICE. THEY CAN LOOK UP CAMPBELL'S NAME AND SEE THE
14 DISPUTE DATE RESOLUTION.

15 **THE COURT:** COMPLAINTS DON'T HAVE TO BE LONG, THEY
16 JUST HAVE TO BE SUBSTANTIVE. IF THE COMPLAINT IS THAT THERE
17 ARE FRAUDULENT BUYERS, THAT'S A WHOLLY DIFFERENT THING THAN
18 GENUINE DISPUTES, OR MAYBE NOT GENUINE DISPUTES BETWEEN A
19 BUYER AND A SELLER FOR WHICH EBAY IS, DESPITE THEIR CONTRACT,
20 TREATING DIFFERENTLY.

21 SO, WHAT I HEAR YOU SAYING IS THAT YOU'VE PLED ONE, BUT
22 YOU HAVEN'T PLED THE OTHER, OTHER THAN TO SAY -- OTHER THAN TO
23 THROW IT INTO THE POT.

24 **MR. FERRIGNO:** WELL, YOUR HONOR, IT IS FRAUDULENT FOR
25 A BUYER TO CLAIM THAT SOMETHING IS --

1 **THE COURT:** THERE ARE LOTS OF THINGS THAT ARE
2 FRAUDULENT. THE QUESTION IS WHAT ARE THE FACTS UNDERLYING THE
3 FRAUDULENT CONDUCT AT ISSUE. AND THAT'S WHAT I'M TRYING TO
4 UNDERSTAND.

5 **MR. FERRIGNO:** OKAY. SO, WHAT WE'RE SAYING IS,
6 WHETHER IT WAS A SITUATION WHERE SOMEONE CLAIMS THEY NEVER
7 RECEIVED THE PRODUCT OR WHETHER IT'S A SITUATION WHERE IT'S
8 SIGNIFICANTLY NOT AS DESCRIBED, IF THE BUYER IS FALSIFYING HIS
9 CLAIM, IT'S A FRAUDULENT CLAIM.

10 **THE COURT:** RIGHT.

11 **MR. FERRIGNO:** SO THAT'S WHAT WE ARE SAYING, THAT
12 THESE WERE ALL FRAUDULENT CLAIMS.

13 **THE COURT:** BUT YOU ONLY HAVE EVIDENCE OF ONE NOT OF
14 THE OTHER, IS THAT IT?

15 **MR. FERRIGNO:** NO, YOUR HONOR. I THINK THAT WE
16 ENCOMPASS ALL OF THOSE TYPES OF CLAIMS IN THIS. WE DIDN'T SAY
17 THAT ALL OF THESE WERE SNAD CLAIMS. NOT AT ALL.

18 **THE COURT:** WELL, THAT'S WHAT SHE SAID. DID YOU SAY
19 THAT ANY OF THEM WERE?

20 **MR. FERRIGNO:** WE DIDN'T DISTINGUISH, YOUR HONOR. WE
21 SAID FRAUDULENT BUYERS, I BELIEVE. I CAN TAKE A QUICK LOOK.

22 **THE COURT:** ALL RIGHT. NEXT ISSUE, MS. SACKS.

23 **MS. SACKS:** YES, YOUR HONOR.

24 ANOTHER EXAMPLE. ONE OF THE BASES FOR THE BREACH OF
25 CONTRACT CLAIM AGAINST EBAY IS A FAILURE TO REFUND THE FINAL

1 VALUE FEE.

2 LOOKING AT THE ACTUAL PROVISIONS OF THE EBAY USER
3 AGREEMENT, THE ONLY INSTANCE IN WHICH EBAY IS REQUIRED TO
4 CREDIT A FINAL VALUE FEE IS WHERE A SALES TRANSACTION HAS BEEN
5 RESCINDED VOLUNTARILY BY THE SELLER. SO THE BUYER DISPUTES
6 IT, THE SELLER SAYS, OKAY, YOU KNOW WHAT, YOU'RE RIGHT, SO IT
7 NEVER GOES TO EBAY FOR THE DECISION-MAKING PROCESS.

8 THIS IS ALLEGED IN THE THIRD AMENDED COMPLAINT AT
9 PARAGRAPH 25.

10 **THE COURT:** MR. FERRIGNO --

11 **MS. SACKS:** WELL, AGAIN -- BUT THERE'S NO ALLEGATION
12 THAT THIS SELLER EVER ENGAGED IN SUCH AN INFORMAL RESOLUTION
13 SO THAT SHE WOULD BE ENTITLED IN ANY WAY TO THE REFUND OF ANY
14 FINAL VALUE FEE.

15 **THE COURT:** MR. FERRIGNO.

16 **MR. FERRIGNO:** YOUR HONOR, I CONCEDE THAT WE DO NOT
17 MAKE -- WE DO NOT AFFIRMATIVELY STRIKE AT THE -- WHETHER THAT
18 CONDITION EXISTED OR NOT TO OUR CLAIM. WE DO NOT ALLEGE THAT
19 CONDITION BEING COMPLIED WITH, BUT WE CAN. AND WE WOULD ASK
20 TO AMEND IF THAT IS DEEMED TO BE SOMETHING THAT THE COURT
21 FEELS IS NECESSARY.

22 ALL WE'RE SAYING IS, IS THAT THERE'S ALL THESE
23 TRANSACTIONS WE RESCINDED ON, THE BUYER'S ALWAYS RIGHT, AND
24 THEY DIDN'T REFUND OUR FINAL VALUE FEES FOR THE TRANSACTIONS.

25 **THE COURT:** ALL RIGHT. NEXT ISSUE.

1 **MS. SACKS:** YES, YOUR HONOR.

2 THIS GOES TO THE BUYER'S ALWAYS RIGHT POLICY. THERE SEEMS
3 TO BE A BIT OF A TRANSMUTATION IN WHAT THE PLAINTIFF IS
4 COMPLAINING ABOUT ON THE BUYER'S-ALWAYS-RIGHT POLICY.

5 NOW THE ARGUMENT IS MADE THAT EBAY DOES NOT CONSIDER
6 DOCUMENTATION. PLAINTIFF HAS CONCEDED, AND IT'S CONCEDED
7 RIGHT IN THE TAC AT PARAGRAPH 27 THAT UNDER THE EBAY USER
8 AGREEMENT, BUYERS AND SELLERS PERMIT EBAY TO MAKE A FINAL
9 DECISION AT ITS SOLE DISCRETION, AT ITS SOLE DISCRETION, ON
10 ANY CLAIM THAT A BUYER FILES WITH EBAY UNDER THE EBAY BUYER
11 PROTECTION POLICY.

12 **THE COURT:** YOU ARE NOT SAYING THAT SOLE DISCRETION
13 MEANS THAT YOU CAN VIOLATE THE COVENANT OF GOOD FAITH AND FAIR
14 DEALING, DO YOU?

15 **MS. SACKS:** NO, YOUR HONOR. BUT WE'RE SAYING THEY
16 GET THE FINAL DECISION-MAKING AUTHORITY.

17 SO PLAINTIFF SAYS, OH, WELL, THE WAY THEY ARE VIOLATING
18 THAT IMPLIED COVENANT IS THEIR REFUSAL TO CONSIDER
19 DOCUMENTATION THAT A SELLER PROVIDES TO SUPPORT ITS SIDE OF
20 THE DISPUTE.

21 NOWHERE IN THE TAC DOES THE PLAINTIFF EVER ASSERT THAT SHE
22 PROVIDED DOCUMENTATION TO EBAY THAT EBAY REFUSED TO CONSIDER.
23 NOT ONCE.

24 **THE COURT:** RESPONSE.

25 **MR. FERRIGNO:** YOUR HONOR, WE DID ALLEGE THAT WE

1 PROVIDED DOCUMENTATION AND IT WAS NOT CONSIDERED. IT WAS
2 ALWAYS THE BUYER'S ALWAYS RIGHT. WE DID NOT SPECIFY WHAT
3 DOCUMENTATION WE PROVIDED, BUT I CAN -- I THINK I CAN GO TO
4 THAT ALLEGATION ABOUT THE GENERALLY THAT THEY REFUSED TO
5 CONSIDER OR DID NOT CONSIDER, OR WORDS TO THAT EFFECT. I
6 DIDN'T ACTUALLY... LET'S SEE HERE.

7 **THE COURT:** HOW ABOUT PARAGRAPH 28?

8 **MR. FERRIGNO:** YES, YOUR HONOR, THERE IT IS.

9 AND WE ALLEGE THAT IT WAS A BREACH BECAUSE, HOWEVER, IN
10 THESE BUYER PROTECTION POLICY CLAIMS THAT ARE FILED BY BUYERS,
11 DEFENDANT EBAY, INC. HAS BREACHED ITS USER AGREEMENT WITH THE
12 PLAINTIFF AND MEMBERS OF THE PLAINTIFF CLASS BY REFUSING TO
13 CONSIDER DOCUMENTATION PROVIDED BY THE PLAINTIFF AND THE
14 MEMBERS OF THE PLAINTIFF CLASS SHOWING THAT BUYERS CLAIMS ARE
15 WITHOUT MERIT.

16 **THE COURT:** SO WHY IS --

17 **MS. SACKS:** BUT, YOUR HONOR, IN THAT 133 INSTANCES
18 THAT WE'VE DISCUSSED HERE, AT NO TIME HAS THE PLAINTIFF EVER
19 ALLEGED THAT THE FAILURE THERE ON EBAY'S PART WAS TO CONSIDER
20 DOCUMENTATION. IT'S PRESENTED AS A HE-SAID-SHE-SAID.

21 **THE COURT:** I DON'T UNDERSTAND. THIS SAYS AT
22 LINE 15 -- I GUESS IT STARTS AT 13.

23 "DEFENDANT HAS BREACHED ITS USER AGREEMENT WITH THE
24 PLAINTIFF AND MEMBERS OF THE PLAINTIFF CLASS BY
25 REFUSING TO CONSIDER DOCUMENTATION PROVIDED BY THE

1 PLAINTIFF AND MEMBERS OF THE PLAINTIFF'S CLASS."

2 MS. SACKS: YOUR HONOR, TO ME THAT'S A CONCLUSORY
3 ALLEGATION.

4 THE COURT: THAT COULD BE CONCLUSORY, BUT THAT IS NOT
5 WHAT -- AGAIN, YOU KNOW, MS. SACKS, WE HAVE A LOT OF WORK IN
6 THIS DISTRICT.

7 MS. SACKS: I UNDERSTAND, YOUR HONOR.

8 THE COURT: AND IF YOU WANT TO SAY THAT THERE IS A
9 BALD STATEMENT OF CONCLUSIONS THAT ARE ALLEGED IN THE
10 COMPLAINT RATHER THAN NO ALLEGATIONS, YOU NEED TO BE MORE
11 PRECISE.

12 MS. SACKS: I APOLOGIZE, YOUR HONOR.

13 THE COURT: AGAIN, THIS IS YET, YOU KNOW, ANOTHER
14 HIGHLIGHTED EXAMPLE OF WHAT I WOULD CONSIDER TO BE
15 INAPPROPRIATE BRIEFING BY THE DEFENSE.

16 MS. SACKS: YOUR HONOR, I WILL BE HAPPY TO GO BACK
17 AND CHECK, BUT I BELIEVE THAT WHAT WE SAID WAS SHE DID NOT
18 ALLEGE A SPECIFIC INSTANCE OF PROVIDING DOCUMENTATION THAT WAS
19 NOT CONSIDERED.

20 THE COURT: DON'T MAKE OUR JOB HARDER THAN IT IS.

21 MS. SACKS: CERTAINLY THAT'S NOT OUR INTENT, YOUR
22 HONOR.

23 THE COURT: YOU HAVE. I'M JUST TELLING YOU. THE
24 APPROACH THAT YOU'VE TAKEN IS NOT HELPFUL.

25 MS. SACKS: YOUR HONOR --

1 **THE COURT:** I DON'T WANT TO HEAR IT. I GET THE LAST
2 WORD.

3 NEXT ISSUE.

4 **MR. FERRIGNO:** MY TURN, YOUR HONOR?

5 **THE COURT:** NO. NEXT ISSUE.

6 **MR. FERRIGNO:** MISS SACKS. OKAY.

7 **MS. SACKS:** COUNSEL SAID SOMETHING ABOUT LANGUAGE IN
8 THE EBAY COMPLAINT. I'M NOT SURE WHAT HE WAS REFERRING TO,
9 YOUR HONOR. I THINK THAT YOU WERE REFERRING TO THE EBAY USER
10 AGREEMENT, BUT I WANTED TO MAKE SURE BEFORE I WENT ON ANY
11 FURTHER.

12 HE SAID IT'S NOT JUST LANGUAGE IN THE EBAY COMPLAINT,
13 THERE'S ALSO AN INTRODUCTION TO IT --

14 **MR. FERRIGNO:** YES.

15 **MS. SACKS:** -- THAT HAS LANGUAGE. OKAY. THANK
16 YOU --

17 **MR. FERRIGNO:** EBAY, THE INTRODUCTION--

18 (SIMULTANEOUS COLLOQUY.)

19 **MS. SACKS:** -- I WANTED TO MAKE SURE I UNDERSTOOD.

20 **THE COURT:** ONE AT A TIME.

21 **MR. FERRIGNO:** SORRY.

22 **MS. SACKS:** YOUR HONOR, AS I UNDERSTAND IT,
23 MR. FERRIGNO IS NOW ASKING FOR LEAVE TO AMEND YET AGAIN.

24 **THE COURT:** WELL, I'LL DECIDE.

25 **MS. SACKS:** THAT WOULD BE THE --

1 **THE COURT:** I DON'T NEED TO HEAR ARGUMENT ON IT.

2 **MS. SACKS:** THE ONLY REASON I RAISE THAT IS BECAUSE
3 THERE WAS NO REQUEST FOR LEAVE TO AMEND.

4 **THE COURT:** I'LL DECIDE. NEXT.

5 **MS. SACKS:** OKAY.

6 I WOULD ALSO IDENTIFY WITH REGARD TO THE REQUEST FOR
7 JUDICIAL NOTICE -- ACTUALLY, MAY I ASK FOR A RULING ON THAT
8 FIRST? ARE YOU ALLOWING THE REQUEST FOR JUDICIAL NOTICE?

9 **THE COURT:** I'M NOT GOING TO GIVE YOU ONE RIGHT NOW.

10 **MS. SACKS:** OKAY. FAIR ENOUGH.

11 WELL, YOUR HONOR, I WOULD THEN, AGAIN, JUST HIGHLIGHT FOR
12 YOUR ATTENTION THE FIRST EXHIBIT TO THE REQUEST FOR JUDICIAL
13 NOTICE.

14 THIS GOES DIRECTLY TO THIS NOTION THAT THE MONEY IS ALWAYS
15 KEPT BY -- I'M GOING TO CALL IT EBAY/PAYPAL BECAUSE THESE TWO
16 THINGS HAVE BEEN CONFLATED SO MUCH THROUGHOUT THE THIRD
17 AMENDED COMPLAINT, I HESITATE TO TRY AND SEPARATE ONE FROM THE
18 OTHER ON THIS ISSUE.

19 THIS IS AN INSTANCE IN WHICH THE FINAL DECISION THAT WAS
20 ISSUED STATES:

21 "THIS CASE WAS DECIDED IN THE BUYER'S FAVOR ALTHOUGH
22 YOU WON'T HAVE TO REIMBURSE YOUR BUYER FOR THIS
23 TRANSACTION."

24 SO THE WHOLE NOTION THAT COMES ACROSS THROUGH THE THIRD
25 AMENDED COMPLAINT, THAT IN ALL INSTANCES EBAY SIMPLY MAKES THE

1 DECISION IN FAVOR OF THE BUYER, AND AS A RESULT, THE SELLER IS
2 OUT OF MONEY -- OUT OF THE MONEY FOR -- WHAT IT WAS SUPPOSED
3 TO HAVE RECEIVED FROM THE BUYER IS REFUTED BY ONE OF THE
4 DOCUMENTS THAT THE PLAINTIFF HAS ATTACHED TO THE REQUEST FOR
5 JUDICIAL NOTICE ITSELF.

6 **THE COURT:** WHAT EXHIBIT IS THAT?

7 **MS. SACKS:** IT IS EXHIBIT A. IT'S ATTACHED TO --

8 **THE COURT:** I HAVE IT NOW.

9 **MS. SACKS:** -- MR. FRANKLIN'S DECLARATION. IT'S AT
10 DOCUMENT PAGE 4 OF 51 IN DOCUMENT 51-1.

11 **THE COURT:** ALL RIGHT. WHICH OF THOSE PAGES ARE YOU
12 AT?

13 **MS. SACKS:** IT'S SPECIFICALLY PAGE 4 OF 51. IT HAS A
14 STAMP AT THE BOTTOM EXHIBIT A.

15 **MR. FERRIGNO:** THAT PAGE HAS EXHIBIT A ON THE BOTTOM?

16 **MS. SACKS:** YES. STAMP ON THE BOTTOM.

17 (PAUSE IN THE PROCEEDINGS.)

18 **THE COURT:** OKAY. NEXT?

19 **MS. SACKS:** OKAY. COUNSEL REFERENCED THE INTENTIONAL
20 INTERFERENCE CLAIM. IF I COULD DIRECT MY COMMENTS TO THAT FOR
21 A MOMENT?

22 THE ESSENCE OF --

23 **THE COURT:** LET ME JUST MAKE SURE. MR. FERRIGNO, YOU
24 ARE CONCEDING THAT IT SHOULD BE DISMISSED AS OF -- AS TO
25 PAYPAL, CORRECT?

1 **MR. FERRIGNO:** YES, YOUR HONOR.

2 **THE COURT:** ALL RIGHT. GO AHEAD.

3 **MR. FERRIGNO:** THAT IS THE ONE THAT WAS THE TYPO.

4 **THE COURT:** GO AHEAD.

5 **MS. SACKS:** SO, YOUR HONOR, WITH REGARD TO THE EBAY
6 INTERFERENCE CLAIM: IN ESSENCE, WHAT I UNDERSTAND PLAINTIFF
7 IS SAYING IS THAT PLAINTIFF HAS A TRANSACTION AS A SELLER WITH
8 A BUYER, AND THAT EBAY, BY ITS QUOTE-UNQUOTE
9 "BUYERS-ALWAYS-RIGHT" POLICY, INTERFERES WITH THAT CONTRACT --
10 AND I GUESS I WOULD POSIT AS A QUESTION, THE BUYER IS THE ONE
11 WHO HAS REPUDIATED THE CONTRACT. THE BUYER HAS SAID, THIS
12 CONTRACT IS OFF. I WANT MY MONEY BACK FOR WHATEVER REASON,
13 WHETHER THE PRODUCT DOES NOT CONFORM AS IT WAS PROMISED,
14 WHETHER IT WAS NEVER DELIVERED, WHATEVER THE RATIONALE IS. SO
15 THE CONTRACT THERE, IN ITS ESSENCE, THE ONE THEY ARE CLAIMING
16 IS BEING INTERFERED WITH IS NOT GOING FORWARD AT THE
17 INITIATION OF EBAY, IT'S THE BUYER WHO HAS SAID, I WANT MY
18 MONEY BACK.

19 SO HOW THEN -- AND, AGAIN, IT'S DONE IN THE CONTEXT WHERE
20 BOTH THE BUYER AND THE SELLER HAVE SAID, AND BY THE WAY, WE
21 ARE GOING TO VEST THE DECISION ABOUT WHO WINS IN EBAY. SO HOW
22 COULD EBAY, ACTING ON THAT VESTED DISCRETION, BE INTERFERING
23 WITH A CONTRACT?

24 IF ANYTHING, EBAY'S ACTIONS THERE WOULD HAVE TO BE
25 PRIVILEGED. IT MAY BE OTHER THINGS THAT THE PLAINTIFF WANTS

1 TO CLAIM IT TO BE, BUT IT CERTAINLY CAN'T BE INTENTIONAL
2 INTERFERENCE.

3 **THE COURT:** RESPONSE?

4 **MR. FERRIGNO:** YOUR HONOR, IF I CAN TAKE A QUICK
5 LOOK.

6 WHERE ARE YOU REFERRING TO, COUNSEL, IN THE COMPLAINT?
7 WHAT CAUSE OF ACTION, FIFTH?

8 **THE COURT:** FIFTH CAUSE OF ACTION.

9 **MR. FERRIGNO:** OKAY.

10 **THE COURT:** AND MAINTAIN YOUR COMMENTS TO ME.

11 **MR. FERRIGNO:** YES, YOUR HONOR.

12 **THE COURT:** I THOUGHT THIS WAS --

13 **MR. FERRIGNO:** I THOUGHT IT WAS INTERNATIONAL SALES.

14 **THE COURT:** RIGHT. THAT'S WHAT I THOUGHT.

15 **MR. FERRIGNO:** THAT'S WHAT I'M CHECKING, YOUR HONOR,
16 JUST TO MAKE SURE.

17 **THE COURT:** I THOUGHT IT RELATED TO THE INTERNATIONAL
18 SALES.

19 (PAUSE IN THE PROCEEDINGS.)

20 SO IF EBAY IS CANCELING PAYMENT ON INTERNATIONAL SALES,
21 THAT'S WHAT I THOUGHT THE INTERFERENCE WAS REFERENCING.

22 **MS. SACKS:** YOUR HONOR, IF I MAY.

23 THE INTENTIONAL INTERFERENCE CLAIM, WHICH IS THE FIFTH
24 CAUSE OF ACTION, INCLUDES AT PARAGRAPH 57:

25 "BY ENFORCING ITS POLICY THAT THE BUYER ALWAYS WINS,

1 IRRESPECTIVE OF WHETHER THE BUYER DESERVES TO WIN,
2 THIS CONDUCT ON THE PART OF DEFENDANT EBAY WAS
3 INTENDED TO DISRUPT THE PERFORMANCE OF THE CONTRACT."

4 AND IT GOES ON FROM THERE. THERE IS ALSO, SEPARATE AND
5 APART, IN THE INTERNATIONAL -- I'M SORRY, INTENTIONAL
6 INTERFERENCE AN ISSUE ABOUT INTERNATIONAL BUYERS.

7 I WAS DIRECTING MYSELF TO THE FIRST THEORY THAT WAS PLED.

8 **MR. FERRIGNO:** THE -- COUNSEL IS CORRECT, YOUR HONOR.

9 **THE COURT:** ALL RIGHT. SO?

10 **MR. FERRIGNO:** SO, IF THE AGREEMENT BETWEEN THE BUYER
11 AND SELLER IS WE'RE GOING TO PROVIDE CONSIDERATION IN RETURN
12 FOR WHAT YOU HAVE REPRESENTED IS A CERTAIN PRODUCT, AND THE --
13 IF THAT -- INFERENTIALLY IF THE PRODUCT COMPLIES WITH HOW IT
14 IS REPRESENTED, THEN YOU HAVE A SALES TRANSACTION.

15 IN THIS SITUATION, WHETHER IT WAS -- WHEN IT'S NOT --
16 SORRY. WHEN IT IS AS REPRESENTED, IT INTERFERES -- EBAY
17 INTERFERES WITH THE SALE BY ALWAYS FAVORING THE BUYER. THE
18 BUYER MAY, AT THE SAME TIME, WANT TO RESCIND FOR FRAUDULENT
19 REASON, BUT AT THE SAME TIME, EBAY IS PARTICIPATING IN THAT
20 PROCESS BY WRONGFULLY APPLYING A STANDARD THAT SAYS THE BUYER
21 ALWAYS WINS EVEN WHEN THERE'S DOCUMENTATION PROVIDED SHOWING
22 OTHERWISE.

23 AND ONE OTHER COMMENT, YOUR HONOR.

24 **THE COURT:** NO. JUST HOLD ON.

25 **MR. FERRIGNO:** OKAY. I FORGOT SOMETHING IMPORTANT.

(PAUSE IN THE PROCEEDINGS.)

THE COURT: IN ORDER TO STATE A CLAIM FOR INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONS, UNDER CALIFORNIA SUPREME COURT AUTHORITY, YOU WOULD HAVE TO PROVE THAT THE DEFENDANT INTENDED TO DISRUPT THE PERFORMANCE OF THE CONTRACT.

MR. FERRIGNO: I WANT TO GO TO THAT, YOUR HONOR, BECAUSE WE ALLEGE AT NUMBER --

THE COURT: THE CONTRACT IS THE PURCHASE AND SALE OF AN ITEM, CORRECT?

MR. FERRIGNO: IT'S MORE THAN THAT, YOUR HONOR. THERE'S A NO RETURN PROVISION IN THE AGREEMENTS THAT EBAY INTERFERES WITH. SO --

THE COURT: THE CONTRACT BETWEEN THE BUYER AND THE SELLER IS FOR THE PURCHASE OF AN ITEM, ISN'T IT?

MR. FERRIGNO: YES, YOUR HONOR.

THE COURT: THAT'S THE FUNDAMENTAL PURPOSE --

MR. FERRIGNO: YES.

THE COURT: -- OF THE TRANSACTION.

MR. FERRIGNO: YES.

THE COURT: SO WHAT CONDUCT DISRUPTS THAT PERFORMANCE?

MR. FERRIGNO: EBAY HAS A PROVISION IN THEIR CONTRACTS WITH THE BUYERS:

"IF YOU RECEIVED AN ITEM THAT IS NOT AS DESCRIBED OR DIDN'T RECEIVE AN ITEM AT ALL, EBAY BUYER PROTECTION

1 ALWAYS PROTECTS YOU EVEN IF THE SELLER DOES NOT OFFER
2 RETURNS."

3 AND WHAT WE ARE SAYING IS, WHEN WE HAVE AN AGREEMENT WITH
4 A BUYER -- BETWEEN A BUYER -- WITH A BUYER THAT PROVIDES FOR
5 NO RETURNS, EBAY INTERFERES WITH THOSE.

6 AND THAT'S AT PARAGRAPH 63.

7 **THE COURT:** SO THIS ONLY RELATES TO CONTRACTS THAT
8 HAVE NO RETURN POLICIES?

9 **MR. FERRIGNO:** THAT'S -- THAT'S -- THAT PARTICULAR
10 PROVISION THERE, YES, YOUR HONOR, JUST FOR THE INTENTIONAL
11 INTERFERENCE.

12 **THE COURT:** SO THE INTENTIONAL INTERFERENCE IS
13 ONLY -- IS LIMITED THEN TO ONLY THOSE CONTRACTS AND HAVE YOU
14 ALLEGED THAT SHE HAD A NO RETURN POLICY?

15 **MR. FERRIGNO:** WELL, I THINK WE DO.

16 **THE COURT:** AND CAN YOU EVEN HAVE IT?

17 **MR. FERRIGNO:** WHY CAN'T YOU, YOUR HONOR?

18 **THE COURT:** BECAUSE YOU ARE USING SOMEONE'S OTHER
19 DISTRIBUTION CHANNEL.

20 **MR. FERRIGNO:** I'M -- I'M NOT SURE HOW TO RESPOND TO
21 THAT. I DON'T KNOW.

22 **THE COURT:** WELL, I MEAN, YOU'VE GOT LOTS OF THEORIES
23 HERE. YOU'RE THROWING EVERYTHING IN WITH THE KITCHEN SINK.
24 SOME MAY SURVIVE AND SOME MAY NOT.

25 WHAT IS THIS ONE? THAT'S WHAT I'M TRYING TO UNDERSTAND.

1 **MR. FERRIGNO:** THAT ONE IS THAT THERE ARE OCCASIONS
2 WHEN OUR SELLER, THE PLAINTIFF, AND MANY OTHER PLAINTIFFS HAVE
3 NO RETURN POLICIES.

4 **THE COURT:** WHERE IS THE NO RETURN POLICY ALLEGED IN
5 THE COMPLAINT?

6 **MR. FERRIGNO:** WELL, WE SAID HERE --

7 **THE COURT:** GIVE ME A PARAGRAPH.

8 **MR. FERRIGNO:** THAT'S PARAGRAPH 63.

9 "THUS, EBAY ALLOWS AND PROMOTES BUYERS IN BREACHING
10 THEIR AGREEMENTS WITH SELLERS BY BREACHING THE NO
11 RETURN PROVISION OF THE AGREEMENT. THE EFFECT IS
12 THAT DEFENDANT EBAY, INC. FORCES THE RESCISSION OF
13 THOSE CONTRACTS BETWEEN BUYERS AND SELLERS EVEN
14 THOUGH THE AGREEMENTS WERE ENTERED INTO WITH A
15 NO-RETURN PROVISION."

16 AND THEN:

17 "ON MULTIPLE OCCASIONS" -- FURTHER ON IN PARAGRAPH 63:

18 "THE PLAINTIFF HAS ENTERED INTO CONTRACTS WITH BUYERS
19 WHERE THE PLAINTIFF HAD INSERTED A NO RETURN
20 PROVISION INTO THE AGREEMENT. NOTWITHSTANDING THE NO
21 RETURN PROVISION, DEFENDANT EBAY, INC. ALLOWED THE
22 BUYER TO RESCIND THOSE AGREEMENTS BY FORCING THE
23 PLAINTIFF TO RETURN THE BUYER'S MONEY. PLAINTIFF WAS
24 DAMAGED AS A RESULT OF THESE LOST SALES."

25 AND SO THAT'S ONE OF THE INTENTIONAL INTERFERENCE. THE

1 OTHER ONE IS THE INTERNATIONAL SALES INTERFERENCE. AND I
2 THINK THERE WAS ONE MORE HERE, YOUR HONOR.

3 (PAUSE IN THE PROCEEDINGS.)

4 YES, YOUR HONOR. SORRY. THERE'S THE ISSUE OF THE NEW
5 TERM THAT INTERFERES WITH THE SELLER'S TOP RATING CATEGORY
6 WHICH ALLOWS HIM BENEFITS WITH EBAY.

7 **THE COURT:** WELL, UNDER AN INTENTIONAL INTERFERENCE
8 WITH CONTRACT, YOU HAVE TO BE MAKING ALLEGATIONS TO A SPECIFIC
9 CONTRACT.

10 **MR. FERRIGNO:** SO, YOU WOULD SAY, YOUR HONOR, THAT WE
11 WOULD HAVE TO ALLEGE GIVEN CONTRACTS WHERE THIS HAS HAPPENED
12 BETWEEN THE BUYER AND THE SELLER THAT PROVIDED FOR THE NO
13 RETURN SPECIFICALLY, AND ALLEGE THOSE SPECIFIC INSTANCES WHEN
14 THAT HAPPENED?

15 **THE COURT:** WELL, HOW ELSE DO YOU GET PASSED THE
16 REQUIREMENTS, THE ELEMENTS OF AN INTERFERENCE WITH CONTRACT?

17 **MR. FERRIGNO:** BY --

18 **THE COURT:** I HAVE TO INSTRUCT A JURY ONE DAY IF THIS
19 THING EVER SURVIVES.

20 **MR. FERRIGNO:** I KNOW, YOUR HONOR, BUT WE WOULDN'T BE
21 GOING ON THE BASIS OF -- AT THAT POINT, YOU ARE GOING ON THE
22 BASIS OF THE JURY INSTRUCTIONS AND THE EVIDENCE THAT IS
23 SECURED THROUGH DISCOVERY AND EVERYTHING ELSE. YOU MAY HAVE
24 ALSO GONE THROUGH A SUMMARY JUDGMENT CHALLENGE, AND SO FORTH.
25 THIS IS JUST A COMPLAINT SAYING --

1 **THE COURT:** WELL, THE COMPLAINT STILL HAS TO ALLEGE
2 SPECIFIC ELEMENTS OF SPECIFIC CLAIMS THAT ARE LEGALLY PROVIDED
3 FOR IN THE LAW.

4 **MR. FERRIGNO:** YES, YOUR HONOR.

5 I THINK WE -- I THINK WE HAVE ALLEGED THAT BECAUSE WE'VE
6 SAID THAT WE INSERTED A NO RETURNS PROVISION IN AGREEMENTS AND
7 EBAY WENT AHEAD ANYWAY AND DID WHAT THEY DID. IF YOU'RE
8 SAYING --

9 (SIMULTANEOUS COLLOQUY.)

10 **THE COURT:** I'M TALKING ABOUT THE THIRD THEORY THAT
11 YOU'RE NOW CREATING OR TALKING ABOUT WHICH IS THIS NOTION THAT
12 THE SELLER'S RATING INTERFERES WITH A CONTRACT.

13 **MR. FERRIGNO:** OH, THE SELLER RATING.

14 WELL, THEY ARE REQUIRING ONE DAY -- EBAY REQUIRES THE
15 SELLER TO SHIP IN ONE DAY. AND THIS IS AN ADDED ON
16 REQUIREMENT AFTER THE TOP SELLER PROGRAM WAS INSTITUTED.

17 AND SO EVEN THOUGH THE AGREEMENT BETWEEN THE BUYER AND
18 SELLER DOESN'T REQUIRE SHIPPING WITHIN ONE DAY, EBAY IS. SO
19 EBAY IS IMPOSING ITS OWN CONTRACTUAL TERM IN ORDER FOR
20 PLAINTIFF TO NOW QUALIFY FOR THE CATEGORY TO GET THE
21 ADDITIONAL BENEFITS UNDER THE TOP SELLER PROGRAM.

22 SO THEY ARE INTERFERING WITH THE AGREEMENT BETWEEN THE
23 BUYER AND THE SELLER IN ORDER TO ACCOMPLISH THAT PURPOSE.

24 **THE COURT:** A THEORETICAL AGREEMENT, RIGHT?

25 **MR. FERRIGNO:** IT'S NOT THEORETICAL, YOUR HONOR. WE

1 HAVE AGREEMENTS WITH THESE SELLERS THAT SAY -- THAT DON'T PUT
2 A ONE DAY REQUIREMENT ON SHIPPING.

3 **THE COURT:** THEY DON'T --

4 **MR. FERRIGNO:** NEXT DAY. AND EBAY IS IMPOSING THIS
5 ON ITS SELLERS IN ORDER TO CONTINUE IN THE TOP SELLER
6 CATEGORY.

7 **THE COURT:** HOW ELSE ARE THEY GOING TO COMMUNICATE
8 WITH A BUYER AS TO WHETHER OR NOT SOMEONE CAN SHIP IN A DAY OR
9 NOT SHIP IN A DAY?

10 **MR. FERRIGNO:** HOW ELSE IS WHO GOING TO COMMUNICATE?

11 **THE COURT:** ISN'T THAT THE POINT OF THE RATING?

12 **MR. FERRIGNO:** TO SHIP IN ONE DAY OR NOT?

13 **THE COURT:** YES.

14 **MR. FERRIGNO:** NO, YOUR HONOR. IT WAS NEVER THAT.
15 THEY ADDED THAT. THAT WAS, I THINK, SPECIFICALLY ALLEGED
16 HERE.

17 IN 2013, THEY ADDED THAT PROVISION. AND OUR GUY HAD
18 ALREADY MET ALL OF THE REQUIREMENTS TO HAVE -- TO RECEIVE THE
19 BENEFITS OF A TOP SELLER.

20 **THE COURT:** AGAIN, HOW WOULD YOU EVER --

21 **MR. FERRIGNO:** OUR PLAINTIFF, EXCUSE ME.

22 **THE COURT:** GO AHEAD.

23 **MR. FERRIGNO:** THE NEXT THING I WANTED TO ADDRESS,
24 YOUR HONOR, IS THE ARGUMENT --

25 **THE COURT:** OKAY. GO AHEAD.

1 **MR. FERRIGNO:** THE ARGUMENT MADE BY THE DEFENDANTS
2 WITH REGARD TO UNCONSCIONABILITY.

3 **THE COURT:** NO, WE ARE NOT AT UNCONSCIONABILITY.

4 DO YOU HAVE ANYTHING ELSE, MS. SACKS?

5 **MS. SACKS:** YES, YOUR HONOR, JUST TO CLOSE THE LOOP
6 ON THOSE TWO ISSUES ON INTENTIONAL INTERFERENCE, IF I MAY.

7 FIRST OF ALL, THIS NOTION THAT THE SELLER CAN INTERJECT A
8 NO REFUNDS POLICY: WHEN THE SELLER ENTERED INTO THE EBAY USER
9 AGREEMENT, THEY WERE INFORMED EXPLICITLY OF EBAY'S REFUND AND
10 RETURN POLICY. THEY CAN'T TRUMP THAT AND CREATE AN
11 INTERFERENCE BY ADDING IN THEIR OWN NO RETURN POLICY. THAT'S
12 THE FIRST THING.

13 THE SECOND ISSUE WITH REGARD TO THE SELLER RATING, YOUR
14 HONOR, THIS HAS NOTHING TO DO WITH DISPUTED ISSUES. IT HAS
15 NOTHING TO DO WITH RETURNS. IT HAS NOTHING TO DO WITH
16 REFUNDS. ALL IT HAS TO DO WITH IS WHO IS IDENTIFIED ON EBAY
17 AS A TOP SELLER. AND THE ONLY PEOPLE WHO GET THERE ARE THE
18 ONES WHO PROMISE THEY WILL DELIVER IN ONE DAY.

19 THIS HAS NOTHING TO DO WITH AN INDIVIDUAL CONTRACT THAT
20 HAS IN ANY WAY BEEN INTERFERED.

21 **THE COURT:** ALL RIGHT. MY PATIENCE IS WANING. WE
22 HAVE BEEN GOING FOR OVER AN HOUR. YOU HAVE FIVE MINUTES TO
23 WRAP UP.

24 **MR. FERRIGNO:** OKAY, YOUR HONOR.

25 WELL, THEN, THE ONLY -- THE TWO THINGS I WANT TO TALK

1 ABOUT IN THE LAST -- IN THE FEW MINUTES THAT I HAVE, IS THE
2 UNCONSCIONABILITY ARGUMENT MADE IN THE REPLY BRIEF.

3 DEFENDANTS STATE THAT WE ARE NOT -- WE HAVEN'T ACTUALLY
4 PLED UNCONSCIONABILITY AND, THEREFORE, WE'RE NOT ENTITLED TO
5 CHALLENGE THESE PRACTICES AS UNCONSCIONABLE.

6 AND WE DO SAY IN PARAGRAPH 6 AND 7 THAT THESE ARE ADHESION
7 CONTRACTS. WITH RESPECT TO THOSE TWO PARAGRAPHS, ONE -- ONE
8 RELATES TO THE PAYPAL AGREEMENT, THE OTHER ONE TO THE EBAY
9 AGREEMENT, WE HAVE PLED ON THE FACE OF IT PROCEDURAL
10 UNCONSCIONABILITY UNDER CALIFORNIA LAW UNDER 1670 POINT
11 WHATEVER IT IS. FORGIVE ME, YOUR HONOR. AND THEN THE FACTS
12 SHOULD SPEAK FOR THEMSELVES ON THE BUYERS-ALWAYS-WIN POLICY.

13 THAT'S NOT A SPECIFIC PROVISION, BUT THE FAILURE TO DO THE
14 THINGS THAT WE HAVE NOW SAID ARE UNCONSCIONABLE ARE -- SPEAK
15 FOR THEMSELVES IN THE -- IN THE COMPLAINT. WE DON'T THINK WE
16 NEED TO SAY THE MAGICAL FORMULAIC WORDS THAT THIS CONSTITUTES
17 SUBSTANTIVE UNCONSCIONABILITY IN ORDER TO PLEAD A CAUSE OF
18 ACTION TO DO THAT.

19 IF YOU THINK THESE PROVISIONS THAT WE'VE CHALLENGED IN THE
20 COMPLAINT ARE INSUFFICIENTLY PLED TO SUPPORT
21 UNCONSCIONABILITY, AND WE CAN ALWAYS AMEND TO INCLUDE THAT.

22 THE OTHER ARGUMENT I WANTED TO TALK ABOUT IS THE BALANCING
23 TEST. AND DEFENDANTS CITE A VAN -- I THINK A VAN SLYKE SECOND
24 DECISION DEALING WITH THE LOZANO DECISION. AND THAT IS A
25 DISTRICT COURT DECISION THAT REFUSED TO FOLLOW THE NINTH

1 CIRCUIT'S -- WE FEEL THAT THEY REFUSED TO FOLLOW THE NINTH
2 CIRCUIT DECISION IN LOZANO BY APPLYING THE BALANCING TEST
3 INSTEAD OF THE TEST THAT REQUIRES A TITHING TO SOME
4 CONSTITUTIONAL PROVISION, ET CETERA.

5 SO, WITH RESPECT TO THAT, THAT SECOND DECISION BY THE
6 DISTRICT COURT DOES NOT TRUMP A NINTH CIRCUIT DECISION, NUMBER
7 ONE. AND NUMBER TWO, ALL IT SAID WAS THAT WE DON'T THINK IT'S
8 NECESSARILY INCONSISTENT WITH LOZANO BECAUSE LOZANO LEFT ROOM
9 FOR BOTH TESTS TO BE APPLIED.

10 SO THAT'S IT FOR ME, YOUR HONOR. I'LL WRAP IT UP WITH
11 THAT.

12 **MS. SACKS:** YOUR HONOR, STATING THAT A CONTRACT IS
13 ONE OF ADHESION DOES NOT PLEAD UNCONSCIONABILITY. IT MIGHT
14 START TO GET YOU THERE ON PROCEDURAL, BUT IT DOESN'T GET YOU
15 ANYWHERE ON SUBSTANTIVE UNCONSCIONABILITY.

16 AND I MAY BE HOISTED ON MY OWN PETARD, BUT WE DID LOOK FOR
17 THE WORD "UNCONSCIONABLE" OR "UNCONSCIONABILITY" IN THE THIRD
18 AMENDED COMPLAINT AND DID NOT SEE IT. IF I MISSED IT, I STAND
19 CORRECTED. BUT I DIDN'T HEAR COUNSEL SAY THAT IT EVER
20 APPEARED IN THE THIRD AMENDED COMPLAINT.

21 WITH REGARD TO THE STANDARD FOR THE UNFAIRNESS PRONG, YOUR
22 HONOR, AS WE POINTED OUT IN OUR PAPERS, THERE IS NOWHERE WHERE
23 THE PLAINTIFF HAS ENUMERATED ANY PUBLIC POLICY THAT IS
24 VIOLATED BY ANY OF THE TERMS IN EITHER OF THE USER AGREEMENTS.

25 THIS IS A VERY CLEAR INSTANCE OF A PLAINTIFF VOLUNTARILY

1 ENTERED INTO A CONTRACT WHICH STATED -- IT GAVE DISCLOSURE OF
2 EVERYTHING OF WHICH SHE NOW COMPLAINS. AND SHE'S WALKING AND
3 SHE'S ASKING THE COURT TO USE THE UNFAIR PRONG OF THE UCL TO
4 REWRITE THE CONTRACT TERMS. AND THAT IS NOT WHAT THE UCL IS
5 INTENDED TO PREVENT.

6 UNLESS YOU HAVE ANY FURTHER QUESTIONS, YOUR HONOR, WE
7 SUBMIT.

8 **MR. FERRIGNO:** I WOULD SUBMIT, TOO, YOUR HONOR.

9 **THE COURT:** SUBMITTED.

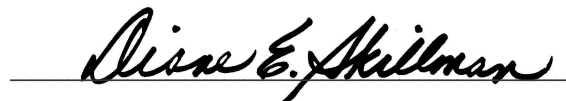
10 **MR. FERRIGNO:** THANK YOU VERY MUCH, YOUR HONOR, FOR
11 LISTENING TO US.

12 **THE COURT:** THANK YOU.

13 (PROCEEDINGS CONCLUDED AT 3:12 P.M.)
14

15 **CERTIFICATE OF REPORTER**

16 I, DIANE E. SKILLMAN, OFFICIAL REPORTER FOR THE
17 UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY
18 CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE
19 RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.
20

21 

22 DIANE E. SKILLMAN, CSR 4909, RPR, FCRR

23 THURSDAY, APRIL 17, 2014
24
25